89-7838

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

ALEXZENE HAMILTON, AS NATURAL MOTHER AND NEXT FRIEND OF JAMES E. SMITH,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES The State of Texas, Respondent herein,[1] by and through its attorney, the Attorney General of Texas, and files this Opposition to Application for Stay of Execution.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals dismissing Hamilton's state collateral application for stay of execution is not yet reported and is attached hereto as Appendix A. The state trial court's findings, adopted by the court below, are attached hereto as Appendix B.

JURISDICTION

Hamilton seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257.

STATEMENT OF THE CASE

Smith was indicted in Harris County, Texas, for the murder of Larry Don Rohus, while in the course of committing and attempting to commit the offense of robbery. In June, 1983, and again in February, 1984, during the trial, Smith was examined by two court-appointed mental health experts, Dr. John Nottingham, a psychiatrist, and Dr. Jerome Brown, a clinical psychologist. In their four reports, **see** Appendix B, Exhibit G, both doctors concluded that Smith was fully competent. Dr Nottingham found Smith keenly aware of the legal proceedings and the possibility of a death sentence; indeed, Smith made clear that he would prefer a death sentence over life imprisonment, undoutedly due to his religious belief in reincarnation. Dr. Nottingham found Smith to be clear of speech, of above-average intelligence, logical, spontaneous and demonstrating no looseness of associations, and not delusional, "unless you want to consider his unigue religious view as delusional." Consequently, Dr. Nottingham stated there was no evidence that Smith suffered from any mental disease or defect that would interfere with his ability to consult with counsel and prepare a defense and that Smith had a

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[1]For clarity, purported "next friend" shall be referred to herein as "Hamilton," real party in interest James Smith as "Smith," and Respondent as "the state."

rational and factual understanding of the charges against him. Dr. Brown agreed, adding that Smith had a rational and factual understanding of the legal proceedings that were taking place. Neither Dr. Nottingham's nor Dr. Brown's conclusionss changed when they examined Smith after his attempted escape and possible suicide attempt, though Dr. Brown suggested precautions should be taken in light of Smith's threats of self-harm.

Smith was found guilty of capital murder by a jury after entering a plea of not guilty. After a separate hearing on the issue of punishment, the jury answered affirmatively the special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (b) (Vernon Supp. 1990). Accordingly, the trial court sentenced Smith to death by lethal injection as required by law. The Court of Criminal Appeals affirmed the conviction and sentence on direct appeal. **Smith v. State**, 744 S.W.2d 86 (Tex.Crim.App. 1987).[2] Smith did not seek certiorari review in this Court.

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[2]Smith attempted to represent himself on appeal. During a hearing in the trial court to determine whether he could proceed on appeal **pro se**, Smith provided the trial court with a brief in which he raised no grounds of error. When questioned by the trial court, Smith responded that he wished to waive his right to appeal, which he termed a constitutional right, or represent himself and file a brief raising no grounds of error, which is the substantial equivalent of waiving appeal. Thus, far from "wildly vascillating" on the issue, as claimed by Hamilton, Smith merely argued alternative grounds to achieve the same end. In any event, it is clear that allowing Smith to represent himself on appeal would have subverted Texas law, inasmuch as state law requires the Court of Criminal Appeals to review the conviction and sentence. Even under **Faretta v. California**, 422 U.S. 806

(Footnote Continued)

The trial court scheduled Smith's execution for May 11, 1988. At the time of the scheduling of his execution, Smith repeatedly indicated his desire to waive further attacks on his conviction and sentence and to have the execution carried out. **See** Appendix B, Exhibit A. Thereafter, on April 14, 1990, Smith was evaluated by two prison psychologists, Drs. Howard Blevins and Yates Morgan. **See** Appendix B, Exhibit H. Both mental health professionals concluded that Smith did not suffer from any mental disease or defect that would impair his ability to rationally choose to forego further appeals.

On April 21, 1988, Smith filed with the trial court, the Court of Criminal Appeals, and the United States District Court for the Southern District of Texas, Houston Division, his "Affidavit Brief to Contest Third Party Intervention." **See** Appendix B, Exhibit B. In the affidavit he again expressed a desire to have his execution carried out and expressly rejected the proposed attempts of third parties to intervene on his behalf to try to stop the execution. On May 5, 1988, without seeking relief in the state trial court, Hamilton, Smith's mother, claiming to be

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(Footnote Continued)
(1975), and its progeny, a defendant is not allowed to use a right of self representation as a means of disrupting orderly procedures. The trial court clearly denied Smith his right to proceed **pro se** because he would subvert state law, not because there was any evidence of mental incompetency. Moreover, Hamilton's assertion in her petition, **see** Petition at 26, that the trial court in 1985 determined that Smith was mentally incompetent to forego further appeals is an outright misrepresentation. As a matter of state law, regardless of his competence, no person receiving a death sentence may forego direct appeal, which is what Smith was seeking in 1985.

acting as "next friend" on behalf of Smith, filed in the Court of Criminal Appeals an emergency application for stay of execution and, alternatively, petition for writ of habeas corpus. The court denied the requested relief on May 9, 1988.[3] Hamilton then filed a petition for writ of certiorari and sought a stay of execution in this Court. This Court stayed Smith's execution on May 10, 1988, **Hamilton v. Texas**, 485 U.S. 1042, 108 S.Ct. 1761 (1988), but denied the petition for writ of certiorari on April 30, 1990. **Hamilton v. Texas**, ___ U.S. ___, 110 S.Ct. 1958 (1990).

On May 17, 1990, Smith appeared before the trial court for the purpose of determining his desire regarding further appeals and his competency to forego further appeals, if he so chose. Smith reaffirmed his desire to forego further appeals and to not be represented by counsel. The trial court, as a precautionary measure, ordered Smith examined by a psychiatrist and a

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[3]Hamilton asserts that this "denial" demonstrated that the Court of Criminal Appeals accorded her "next friend" status because the cause would have been otherwise dismissed. This is highly unlikely. Hamilton's actions in filing at the eleventh hour directly in the Court of Criminal Appeals, which is not a fact finding tribunal entitled to hear evidence, **see Ex parte Rodriguez**, 334 S.W.2d 294 (Tex. Crim. App. 1960), left that court with limited options: either dismiss the action and require Hamilton to proceed in a procedurally proper fashion, an impossible task in light of the lack of sufficient time to so act before the execution, or deny the relief to allow Hamilton to seek relief in this Court. The Court of Criminal Appeals most likely chose the latter course, and its unequivocal rejection of Hamilton's standing as next friend in this case, after she proceeded in a procedurally proper fashion, strongly supports this conclusion.

psychologist to determine his competency to make such a decision. After separate examinations, both mental health experts reported to the trial court that Smith suffered from no mental disease or defect and was fully competent to make a rational choice to forego appeal. Consequently, on May 23, 1990, the trial court scheduled Smith's execution for June 26, 1990.[4]

Despite the mental status reports establishing Smith's competency and the trial court's abundance of caution in assuring itself that Smith is competent, Hamilton, again claiming "next friend" status, at 4:00 p.m. on June 20, 1990, less than six days from the scheduled execution and only three working days before the execution, filed an application for stay of execution, a motion to compel psychiatric examination and a state habeas corpus application on her son's behalf. The trial court entered detailed factual findings and legal conclusions, finding Smith to be competent to be executed, that Smith is not suffering from any mental disease or defect, that Smith understands his legal position and options and demonstrates the ability to make a rational choice among those options. The trial court further found that the 1978 reports by Florida doctors presented by Hamilton were too remote to be beneficial to the inquiry on Smith's **current** mental status, that the affidavit of Dale Piper,

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[4]A transcription of the May 17 and 23 proceedings in the trial court is located in Appendix B, Exhibit D, and the reports of the mental health experts, Dr. James Grant, a psychiatrist, and Dr. Jerome Brown, a psychologist, are located in Appendix B, Exhibit E.

whose status as an expert was rejected by the trial court, was wholly conclusory, was not based on Piper's personal examination of Smith, and was entitled to no weight in the determination of Smith's current mental status, that Hamilton's attorney's affidavit recounting a Florida psychologist's opinion, based upon review of records, that Smith is not competent, even if considered competent evidence,[5] was not based on first-hand examination of Smith, was conclusory, and was insufficient in warrant a hearing or additional psychiatric examination. Consequently, the trial court concluded that Hamilton lacked standing as a next friend because Smith was fully competent to waive further appeals, Smith, in fact, knowingly, intelligently and voluntarily waived his right to forego further appeals, and Smith was competent to be executed. Thus, the trial court concluded that Hamilton's "next friend" application should be dismissed for want of jurisdiction. **See** Appendix A. The Court of Criminal Appeals, determining the trial court's findings to be supported in the record, ordered the application dismissed. **Ex parte Hamilton**, No. 14,380-02 (Tex. Crim. App. June 22, 1990). It is from this

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[5]The trial court properly chastised Hamilton's current counsel for testifying by affidavit as a "fact" witness to express a non-witness' expert opinion. Dr. Joyce Carbonnel's opinion, if it exists, was properly termed "rank hearsay." Moreover, this case raises the prospect of serious ethical oversights by, at the very least, Smith's attorney in his 1978 Florida robbery prosecution. The reports of three Florida doctors, contained in Hamilton's Exhibit 10, are not public records, but were revealed by the Florida Public Defender by telefax on June 18, 1990, without a waiver of either attorney or physician confidentiality by Smith.

dismissal that Hamilton seeks certiorari review and a stay of execution.

STATEMENT OF FACTS

The facts adduced at trial regarding Smith's commission of the capital murder of Larry Don Rohus as well as the evidence offered at the punishment phase of Smith's 1984 trial are accurately set forth in the opinion of the Texas Court of Criminal Appeals as follows:

> A review of the record reveals that Smith was charged with killing Larry Don Rohus, the district manager for Union Life Insurance Company during the robbery of the company's offices. Debra Rene Wilson, the only eyewitness to the offense, testified that she and Rohus were alone in the outer office of the company at approximately 1:00 p.m. on March 7, 1983. As she was counting money in the cash drawer, she heard the sliding glass window, being pulled open. Looking up, she saw a man standing outside the window, wearing a stocking mask over his head. The man, who was pointing a gun at her, cocked the gun and told her to give him all of the money. Wilson related that she instantly panicked and ran behind a filing cabinet. Rohus, who was sitting at a secretary's desk turned to Wilson and told her to give him the money. When Wilson did not move from behind the filing cabinet, Rohus got up and went to the cash drawer. He removed some of the money and holding it in his hand went back towards the window. The gunman told him to put it into a container so Rohus emptied a small trash can that was lined with a plastic bag and put the money inside. He then placed the can on a table near the gunman and began walking towards Wilson. Before the could reach the filing cabinet, however, the gunman instructed Rohus to return to the window. Rohus turned around and began pleading with the gunman not to shoot him. The gunman then said something to Rohus which Wilson was unable to hear. As Rohus began fumbling with his wrist as if to take off his diamond identification bracelet, a gunshot range out.

Rohus began running back towards Wilson and the gunman fired a second shot. After the second shot, Rohus fell to the floor mortally wounded. Medical testimony showed that Rohus died of one gunshot wound to the upper left side of the chest.

Jose Montalvo, a supervisor with Union National Life Insurance Company, testified that he was in his office when he heard gunshots and screams coming from the cashiers office. Montalvo related that he came out of his office just in time to see Smith, who was holding a gun, back away from the sliding glass window. Montalvo followed Smith out of the office and downstairs. There he was joined in the pursuit by a business man named Robert Lawson. Montalvo and Lawson pursued Smith outside, across a vacant lot and into an apartment complex. A group of workmen working on the apartment complex also joined in the pursuit and appellant was apprehended and disarmed near the complex. Montalvo testified that while he was chasing Smith through the apartment complex, he saw Smith turn around at one point and aim his gun at him. Montalvo testified that he ducked behind a corner of the building. Then he heard gunfire. When he looked around the corner he saw that Javier Ramos and the rest of the workmen had Smith down on the ground and were struggling with him. Lawson, the businessman who joined in the chase, testified that he saw appellant turn and aim his gun at both him and Montalvo while they were chasing Smith across the vacant lot.

Javier Ramos, the foreman of the crew working on the apartment complex, testified that he and his men joined in the pursuit after Montalvo called for help. One of his men, Rafael Gutierrez, was the first one to catch up with Smith. When Gutierrez grabbed Smith, Smith aimed his gun at Gutierrez's chest. Ramos testified that he heard the gun click twice. Smith then turned and pointed his gun at Ramos. Ramos related that he told Gutierrez to knock Smith down. Gutierrez came up behind Smith and grabbed him and then the three men began struggling. During this time Smith was trying to knock Gutierrez down with the gun. Ramos grabbed the gun to keep Smith from hitting Gutierrez with it. During

this struggle, Smith pulled the trigger of the gun again and this time the gun fired, with the bullet passing between Ramos' legs. When Smith attempted to pull the trigger again, Ramos put his hand in the way of the hammer so that when appellant pulled the trigger, the hammer hit the web of the skin between Ramos' thumb and forefinger. Smith was eventually wrestled to the ground and released his grip on the gun only after Ramos bit him in the hand.

Further evidence at the guilt-innocence phase of the trial showed that during the late afternoon of February 3, 1984, while the voir dire examination of the jury in the instant case was being conducted, Smith suddenly jumped up from his chair at the counsel table and ran from the courtroom. Deputy Sheriff J. L. Byford and an assistant district attorney pursued Smith down one flight of stairs and out of the annex court building. The two men pursued Smith for approximately four blocks before they lost sight of him. Meanwhile two Houston bondsmen were driving down the busy city street when the spotted Deputy Byford pursuing Smith. They lost sight of Smith for awhile, but spotted him shortly thereafter exiting from the passenger's side of a van which was stopped at a red light. One of the bondsmen gave chase. A Houston police officer who was directing traffic nearby also joined in and eventually tackled and apprehended Smith. Marilyn Grigsby, the driver of the van testified that she was stopped at a red light when Smith ran in front of her van and around to the passenger's side and got in. He asked her to give him a ride. Grigsby testified that she was frightened and after going one block in the stop and go traffic, she asked Smith to get out. He did so. Subsequently Grigsby saw Smith apprehended by the Houston police officer.

The only evidence presented at the punishment stage of the trial by the State consisted of the testimony of Deputy Sheriff Neil Picquet. Picquet testified that on January 17, 1984, he went to the basement holdover cell to escort Smith to the third floor of the Harris County Courts building. Smith refused to allow Picquet to handcuff

his hands behind his back. After Picquet forcibly handcuffed Smith, he asked Smith what he was charged with and what his name was. Smith replied that he was charged with capital murder. Then Smith remarked "I kill people like you." Smith repeated this remark as they were riding up in the elevator. When they reached the third floor of the building, Picquet informed his supervisor of Smith's conduct and threats. Picquet then told Smith than an incident report would be filed against him, and Smith replied, "Fuck you."

Smith took the stand during the punishment stage of the trial and testified that he was thirty-one years old at the time of the trial, that he was one of twelve children and that his parents had divorced when he was very young. He related that he had left home when he was fifteen and had traveled extensively throughout the world. Smith further testified that he served in the United States Navy from March 1972, until June 7, 1975, when he was given a dishonorable discharge because he had struck an officer. Finally Smith testified that he had no prior criminal convictions.

Smith v. State, 744 S.W.2d at 87-89.

I.

THE "NEXT FRIEND" HAS NO STANDING TO INVOKE THIS COURT'S JURISDICTION.

Hamilton asserts that she has standing to pursue this action challenging the validity of Smith's conviction and sentence for three reasons. First, she claims direct injury that will result from the execution of her son, "the death of a loved child." Second, she claims direct injury if her son is executed after an "incomplete and state controlled sham hearing regarding her son's capacity to forego further appeals." Third, she claims standing as a next friend because, she alleges, Smith is not competent to waive further appeals. While the state has no doubt that

Hamilton will be affected by her son's demise, such an injury will not confer standing on Hamilton in her own right.

> We realize that last-minute petitions from parents of death row inmates may often be viewed sympathetically. But federal courts are authorized by the federal habeas statutes to interfere with the course of state proceedings only in special circumstances. Before granting a stay, therefore, federal courts must make certain that an adequate basis exists for the exercise of federal power. In this case, that basis was plainly lacking.

Demosthenes v. Baal, ___ U.S. ___, 110 S.Ct. ___, No. A-857, slip op. at 6 (June 3, 1990); **see also Whitmore v. Arkansas**, ___ U.S. ___, ___, 110 S.Ct. 1717, 1728 (1990) (". . . we think the scope of any federal doctrine of 'next friend' standing is no broader than what is permitted by the habeas corpus statute, which codified the historical practice."). The Revision Note to 28 U.S.C. §2242 specifies that the language "or by someone acting in his behalf" refers to "next friend" practice by citation to **Collins v. Traeger**, 27 F.2d 842, 843 (9th Cir. 1928); **United States ex rel. Funaro v. Watchorn**, 164 F. 152, 1154 (S.D.N.Y. 1908). **Whitmore**, ___ U.S. at ___, 110 S.Ct. at 1727. Hence, this Court lacks jurisdiction to consider Hamilton's petition unless she is acting on Smith's behalf, i.e., establishes "next friend" status.[6]

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[6]Any claim that Hamilton has standing because her personal due process rights were abridged in the state courts because she did not receive notice that Smith was to receive an execution date or be evaluated by Drs. Ganc and Brown is frivolous. (Footnote Continued)

A. The state hearing conducted in this case met constitutional requirements.

Acknowledging that the trial court's and Court of Criminal Appeals' findings are dispositive of her claim of "next friend" standing, Hamilton attacks the procedures by which this determination was made. She complains that (1) she was not notified that an execution date would be scheduled and that Smith would be examined for competency and the habeas court did not conduct an "adversary" hearing; (2) the trial court had prejudged the question of competency; and (3) the state withheld "exculpatory" information from the trial court and the examining experts.

First, Hamilton states no legal basis for requiring that a nonparty be notified of a proceeding. In addition, this Court's precedent provides no support for Hamilton's apparent argument that as soon as a "next friend" makes any allegation, no matter how conclusory, of the death-sentenced inmate's incompetence, there should be an automatic entitlement an adversary proceeding,

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(Footnote Continued)
Hamilton has **never** been accorded representative status, as a conservator, guardian or "next friend," by any judicial authority, state o. federal. The state and state courts gave notice to the one person who was entitled to it, James Edward Smith. Moreover, Hamilton did appear in the state courts and presented her "evidence" in an attemptt to raise a **bona fide** doubt as to Smith's competency and urging further mental status examination and a hearing. Any notice defect was thus cured by her actual participation in the state proceedings. Finally, Hamilton's asserted interest in the integrity of state court proceedings regarding Smith's controversy is no greater than that of any other Texas citizen, but it cannot be argued that every Texas citizen has independent standing to seek review of Smith's conviction and sentence against his wishes. Ultimately, this assertion is no more than a variation of her claim that her familial relationship with Smith suffices to establish standing.

including a competency examination performed by the "next friend's" expert and a hearing. To the contrary, before a court is required to order an examination of the inmate, a certain threshold showing must be made; this is especially true where, as here, the inmate has previously been found competent. **See Ford v. Wainwright**, 477 U.S. 399, 426 (1986) (Powell, J. concurring) (states may require a substantial threshold showing to trigger process for determining competence to be executed). Respondent submits that Hamilton did not make such a showing in the state courts and makes none now.

Moreover, this Court has not required an adversary proceeding in which the purported "next friend" is a party. In **Demosthenes v. Baal**, for example, the state court conducted a hearing after Baal expressed his desire to terminate post-conviction proceedings; the opinion indicates that Baal's parents were not parties to or represented at this hearing. **Id.**, No. A-857, slip op. at 2. Although Baal's parents presented evidence of incompetence that had not been considered by the state court, this Court held that it was not "meaningful evidence" that Baal was incompetent and affirmed the federal district court's denial of an evidentiary hearing. Even in situations where the death sentenced inmate contends that he is incompetent to be executed, under **Ford v. Wainwright**, the presumption of correctness attaches to findings made after a hearing that observes basic fairness, i.e., is conducted by an impartial factfinder that receives evidence and argument from the prisoner's counsel. **Id.** at 427, 106 S.Ct. at 2610 (Powell, J.

concurring). In the procedural posture in which this Court finds itself, review of a state collateral proceeding, no less deference should be accorded the trial court's findings.

Second, Hamilton's assertion that the state habeas judge had predetermined the issue of competence is specious. A hearing was conducted on May 17, 1990, to determine whether Smith still desired to forego further appeals. Appendix B, Exhibit D at 2. The judge's statement to Smith that he did not believe Smith was incompetent was not made in a vacuum, but followed the judge's many opportunities to observe Smith and his knowledge of the numerous mental examinations that uniformly revealed Smith to be competent.[7] Indeed, after Smith characterized additional mental examinations as "cover[ing] the bases," the judge noted that he and Smith had covered "so many bases over a period of six years." Id., Exhibit D at 6. The record merely reflects that the judge was careful to note that his decision to order yet another round of examinations was due not to a perception that Smith was incompetent but out of an abundance of caution. Had the court not done so, Hamilton undoubtedly would have alleged that the judge's order of mental status examinations reflected that the judge had

[7]In Justice Powell's concurring opinion in **Ford**, 477 U.S. at 426 106 S.Ct. at 2610, he noted that states may properly employ a presumption that a death sentenced inmate, who has been found competent or whose competence has previously been conceded, remains competent at the time of execution.

questions about Smith's competence or that Smith must have manifested signs of incapacity not apparent from the cold record.[8]

Third, Hamilton's claim that the state impermissibly withheld "exculpatory" evidence of Smith's alleged incompetence is plainly without merit. At the outset, Hamilton cannot demonstrate harm because she presented the allegedly withheld evidence to the state courts, which considered it and found it insufficient to raise a **bona fide** issue of incompetence. Moreover, Hamilton fails to show that the Florida medical reports (Hamilton's Exhibit 10),[9] which she presented, constituted information within the prosecution's knowledge or that the state even had legitimate access to the reports. Hamilton's Exhibit 10 consists of letters, some of which are titled "PRIVILEGED AND

[8]Consistent with the vitriolic tenor of her pleadings, Hamilton refers to the mental health experts who examined Smith as "employ[ees] of the executive branch," describing wording on the letterhead of their stationary "The Mental Health and Mental Retardation Authority for Harris County" as a "flagstaff." **See** Petition at 6 & n.5. In fact, the Mental Health and Mental Retardation Authority of Harris County, which provides psychiatric services to county inmates, is a county department which is overseen by the Texas Department of Mental Health and Mental Retardation, and is hardly an arm of the prosecution. Drs. Jaime Ganc and Jerome Brown are private practitioners, who contract with MHMR-Harris County to treat county prisoners. Indeed, Dr. Brown testified for Johnny Paul Penry, and his testimony forms the factual basis for this Court's decision in **Penry v. Lynaugh**, ___ U.S. ___, 109 S.Ct. 2934 (1989). Without Dr. Brown, the state submits that Hamilton's current counsel, the Texas Resource Center, would be unable to make the unending **Penry** claims she makes here and in other actions.

[9]Respondent is designating Hamilton's exhibits, as numbered and appended to her state application for habeas corpus relief, which has been filed as an exhibit in this cause.

CONFIDENTIAL," written to a Florida public defender who represented Smith in connection with a 1978 robbery prosecution. Hamilton has not shown that these reports were made a part of a public record so as to remove them from the aegis of Smith's attorney client privilege. Indeed, an examination of the top of the pages comprising Hamilton's Exhibit 10 reveals a "header" produced by telefax transmittal that reflects that the documents were obtained from the Public Defender's office. This unfounded attack can only reflect Hamilton's awareness of the weakness of her position.

B. The record demonstrates that Smith is competent to elect to forego further appeal; hence, Hamilton's attempt to intervene must be dismissed.

To establish standing, Hamilton must show that Smith lacks the competence to elect to forego further appeal. A person seeking to litigate as the "next friend" of another has the burden "clearly to establish" his status. **Whitmore v. Arkansas**, ___ U.S. ___, ___, 110 S.Ct. 1717, 1727 (1990); **see also Lenhard v. Wolff**, 443 U.S. 1306 (1979); **Evans v. Bennett**, 440 U.S. 1301 (1979); **Gilmore v. Utah**, 429 U.S. 1012 (1976). "[O]ne necessary condition for 'next friend' standing in federal court is a showing by the proposed 'next friend' that the real party in interest is unable to litigate his own cause due to mental incapacity." **Whitmore**, ___ U.S. at ___, 110 S.Ct. at 1728; **Gilmore v. Utah**, 429 U.S. at 1012. Where an evidentiary hearing demonstrates that the defendant has knowingly, intelligently, and voluntarily decided to forego further challenges to his

conviction, a purported "next friend" cannot establish standing. **Demosthenes v. Baal**, No. A-857, slip op. at 4, **citing Whitmore**, ___ U.S. at ___, 110 S.Ct. at 1728.

In this context, the standard for competence is whether the real party in interest suffers "from a mental disease, disorder, or defect that substantially affect[s] his capacity to make an intelligent decision." **Whitmore**, ___ U.S. at ___, 110 S.Ct. at 1728, **citing Rees v. Peyton**, 384 U.S. 312, 314 (1966); **accord Rumbaugh v. Procunier**, 753 F.2d 395, 398 (5th Cir.), **cert. denied**, 473 U.S. 919 (1985).

Whitmore and **Baal** merely reaffirm this Court's well-established rule regarding competency. In **Rees v. Payton**, 384 U.S. 312 (1966), a state inmate sentenced to death filed a petition for writ of certiorari to review the court of appeals decision affirming the denial of habeas corpus relief. Rees withdrew the petition before any action was taken, having determined to forego further review of his case. This Court, in "aid of the proper exercise of [its] certiorari jurisdiction," ordered the federal district court to make a judicial determination of Rees' competence, specifically, "whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." **Id.** at 313. The Court supported its order by citing as analogous the provisions of 18 U.S.C. §§4241-4247, which authorize psychiatric or psychological examinations in the

district courts for criminal defendants whose competency to stand trial is in issue. Whether an examination is called for under §4241 is a matter entrusted to the discretion of the court "to determine if there is reasonable cause to believe that the defendant may be incompetent." **United States v. Partin**, 552 F.2d 621, 635 (5th Cir.) (quoting **United States v. Hall**, 523 F.2d 665, 667 (2d Cir. 1975)), **cert. denied**, 434 U.S. 903 (1977); **see also Hammett v. Texas**, 448 U.S. 725 (1980) (inmate allowed to withdraw pro se his certiorari petition with no inquiry into competence where counsel failed to question the client's competence); **Lenhard v. Wolff**, 603 F.2d 91, 93 (9th Cir. 1979) ("Some minimum showing of incompetence must appear before a hearing is necessary.")[10]

This Court has identified three factors which have been found to be relevant in assessing competency to stand trial: (1) the existence of a history of irrational behavior, (2) prior psychiatric opinion, and (3) the defendant's demeanor at trial. **Drope v. Missouri**, 420 U.S. 162, 180 (1975). Likewise, when a court must determine whether to grant a stay of execution based upon the filing of a "next friend" petition, the Court and Justice Rehnquist, acting as Circuit Justice, have articulated factors which are relevant to the determination of whether the "next friend" has made a sufficient demonstration that the death sentenced inmate is incompetent to waive judicial review.

In terminating the stay of execution in **Gilmore v. Utah**, 429 U.S. at 1012, Chief Justice Burger, with whom Justice Powell joined, concurring, found the state's determination of Gilmore's competence to waive his right to direct appeal and any further judicial review to be firmly grounded in the record. Chief Justice Burger looked to Gilmore's own expressions of his choice, the psychiatric examinations conducted prior to his trial, and the psychiatric reports prepared by the prison psychiatrist and psychologists after Gilmore had made his decision to forego further judicial review. **Id.** at 1015 n. 4&5.

In **Evans v. Bennett**, 440 U.S. 1301 (1979), **stay vacated**, 440 U.S. 987 (1979), Justice Rehnquist, acting as Circuit Justice for the First Circuit, granted a stay of execution after having concluded that there existed a probability that four members of the Court would vote to grant the requested relief. However, Justice Rehnquist noted that had he been casting his vote as a Member of the full Court, he would vote to deny the stay. He found correct the district court's determination that Evans' "next friend"

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[10]Smith's attempt to distinguish **Demosthenes v. Baal** on the basis that Dr. Carbonnel, who did not examine Smith, nonetheless renders an opinion that Smith was not competent, whereas the non-examining psychiatrist in **Baal** opined that Baal "may" have been incompetent, is unavailing. The determination of a threshhold showing of doubt of competency does not hinge on the utterance of "magic words" but on reliability of information. Here, Carbonnel's diagnosis of current psychosis, based on review of 1978 reports of a "psychotic break" which never recurred and that was of such a temporary nature that a state court released Smith to out-patient treatment and lay opinions by persons with a vested interest in a stay of execution, pales in comparison with the numerous current opinions from 1983 to present by disinterested mental health experts, coupled with the trial court's unique position of observing Smith in the courtroom. **Compare Rees v. Peyton**, 384 U.S. at 313 (Judicial determination of competence required when, after recent examination, psychiatrist filed detailed report concluding petitioner incompetent).

lacked standing. The only evidence of incompetency presented by the "next friend" was an affidavit of a psychiatrist who stated that Evans refused to be examined and who concluded from conversations with other individuals that Evans was not able to make a rational decision. The rebuttal evidence which Justice Rehnquist and the district court found to be persuasive of competency to make a rational choice was that: (1) Evans had been evaluated prior to trial and was determined fit to stand trial; (2) there was no evidence of any intervening physical or mental disability arising between the time of trial and the filing of the petition and, (3) at no time prior to the filing of the petition had Evans' competency been questioned. Both courts found unpersuasive the argument that the choice of death over continued confinement was evidence of irrationality. **Id.** at 1303-05.

In **Lenhard v. Wolff**, 443 U.S. 1306 (1979), **stay vacated**, 444 U.S. 807 (1979), Justice Rehnquist took the same position taken in **Evans**. Lenhard, a public defender, filed a next friend petition on behalf of Jesse Bishop, a death sentenced inmate. Agreeing with the lower court's determination that the "next friend" had demonstrated insufficient evidence of Bishop's incompetence to waive further judicial review, Justice Rehnquist noted that Bishop had been found competent at the time of trial to plead guilty after an evidentiary hearing at which three examining psychiatrists reported that Bishop was competent. Justice Rehnquist further noted that there had been "no subsequent judicial determination of his competency to waive further

litigation," but that a state-appointed psychiatrist had found Bishop competent based upon a four-hour interview. **Id.** at 1311-12.

In summary, this Court's decisions hold the following:

> (1) A "next friend" petitioner lacks standing to intervene where the death sentenced inmate is competent to waive judicial review.
>
> (2) The burden is on the "next friend" petitioner to prove the death sentenced inmate's incompetence.
>
> (3) The "next friend" petitioner must present sufficient evidence to raise a bona fide and reasonable doubt as to the defendant's incompetence.
>
> (4) Based upon the **Gilmore**, **Evans**, and **Lenhard** decisions of the Supreme Court, the following factors are relevant to a determination of whether a death-sentenced inmate is competent to waive judicial review:
>
> (A) The inmate's expression of his desire to waive judicial review.
>
> (B) Psychiatric determinations made prior to trial.
>
> (C) Evidence of any intervening physical or mental disability arising between the time of trial and the filing of the "next friend" petition.
>
> (D) Psychiatric determinations made subsequent to the death-sentenced inmate's election to waive judicial review.

The state submits that the analytical framework set forth by the Fifth Circuit is appropriate in this case:

> This test requires the answer to three questions:

(1) Is the person suffering from a mental disease or defect?

(2) If the person is suffering from a mental disease or defect, does that disease or defect prevent him from understanding his legal position and the options available to him?

(3) If the person is suffering from a mental disease or defect which does not prevent him from understanding his legal position and the options available to him, does that disease or defect, nevertheless, prevent him from making a rational choice among his options?

If the answer to the first question is no, the court need go no further, the person is competent. If both the first and second questions are answered in the affirmative, the person is incompetent and the third questions need not be addressed. If the first question is answered yes and the second is answered no, the third question is determinative; if yes, the person is incompetent, if no, the person is competent.

Rumbaugh v. Procunier, 753 F.2d at 398-99. The record overwhelmingly demonstrates that Smith is competent, under the **Rumbaugh** standard, to decide whether to forego post-conviction attacks on his conviction and sentence.

Hamilton's petition utterly fails to demonstrate that Smith is incompetent to forego further judicial review of his death sentence, or that an examination is necessary to determine his competence. Moreover, "next friend" clearly has not made a sufficient threshold showing of incompetence to warrant a hearing. In support of her assertion of Smith's incompetence, "next friend" asserts: (1) he was hospitalized for psychiatric evaluation in 1972 while in the Navy; (2) he was found not guilty of robbery in Florida by reason of insanity in 1978; (3) he

attempted suicide in Louisiana in 1981, and after being recaptured in an escape attempt during his capital murder trial; (4) he was in a car accident and later fell in a Houston bank, supposedly injuring his head; (5) he has equivocated in the past about pursuing an appeal; (6) his mother noticed a change in his attitude, attributed in her opinion to an alleged "stroke" he suffered in 1986; and (7) an opinion by an individual with a masters degree in psychology that Smith's "stroke" must have caused neurological damage and that persons with suicidal ideation typically have "limited intellectual focus, or narrowing of mental faculties."

The competency standard set forth by this Court is a factual one. Accordingly, a state court's determination of competency is entitled to a presumption of correctness under 28 U.S.C. § 2254(d) if the finding is fairly supported by the record, **Demosthenes v. Baal**, No. A-857, slip op. at 4 (June 3, 1990), **citing Maggio v. Fulford**, 462 U.S. 111, 117, 103 S.Ct. 2261, 2264 (1983), and must be accorded proper deference in these proceedings. **See Wainwright v. Witt**, 469 U.S. 412 (1985) (Trial court findings of juror bias entitled to presumption of correctness in habeas proceedings and "great deference" on direct appeal). In the instant case, the state habeas court conducted a hearing by receiving evidence and arguments from the state and Hamilton. **See e.g., McCoy v. Lynaugh**, 874 F.2d 954, 960-661 (5th Cir.), **stay denied**, ___ U.S. ___, 109 S.Ct. 2114 (1989); **Evans v. McCotter**, 805 F.2d 1210 (5th Cir. 1986); **see also Ford v.**

Wainwright, 477 U.S. at 426-27 (Powell, J., concurring)[11] (ordinary adversarial procedures, including live testimony, cross-examination, and oral argument are not necessary ingredients of hearing regarding competency for execution, and presumption of correctness is applicable to findings made by a neutral fact finder after receiving the prisoner's evidence and arguments). Thereafter, the court made factual findings regarding Smith's competency and answered negatively all three questions set forth by the Fifth Circuit in **Rumbaugh**. These findings are supported by the record, and are dispositive of Hamilton's claims in this Court.

Smith has been examined four times during the last six years, and on all occasions, he has been found competent: (1) in June 1983 by Dr. Nottingham, M.D., psychiatrist, and Dr. Brown, Ph.D., clinical psychologist, Appendix B, Exhibit G; (2) in February 1984 by Dr. Nottingham and Dr. Brown, **id.**; (3) in April 1988 by Dr. Blevins, Ph.D., clinical psychologist, and Dr. Morgan, Ph.D., correctional psychologist, **id.**, Exhibit H; and (4) in May 1990 by Dr. Ganc, M.D., psychiatrist, and Dr. Brown, **id.**, Exhibits E and F, respectively. Dr. Ganc's report, **id.**, Exhibit E, is based upon an examination of Smith conducted on May 18, 1990, and contains the following observations:

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[11]Justice Powell's concurrence is the law of **Ford** in the sense that it is the narrower of the two opinions holding that the execution of the insane violates the Eighth Amendment. Only three Justices joined Justice Marshall's lead opinion.

> Mr. Smith discussed the charge of Capital Murder as well as the circumstances leading up to his arrest in a logical, coherent and relevant fashion.
>
> * * *
>
> He was able to discuss the function of the defending attorney, the judge, the jury and the district attorney. He has sufficient understanding of the criminal justice system. He is very clear about his present legal situation and the fact that he can appeal at any moment that he desires to do so. He was clear about the fact that he is on death row. He knows the options available to him at the present time.
>
> * * *
>
> He expresses himself in a logical, coherent and relevant fashion. There is no evidence of any psychotic thinking. There is no auditory or visual hallucinations. His thinking was well organized. There was no loosening of associations. His affect was appropriate. He was oriented to person, place and time. His cognitive functioning was intact.

Dr. Jerome Brown's most recent report, **see** Appendix B, Exhibit F, also based on a May 18, 1990 examination of Smith, provides an even more detailed account of Smith's own statements during the examination. Dr. Brown's report makes clear that Smith is aware of his legal options; understands that foregoing further appeals will result in his execution; knows why the death sentence was imposed; and even knows how the execution will be carried out. Dr. Brown, like Dr. Ganc, concludes that Smith does not suffer from a mental illness or defect at the present time and that he has sufficient capacity to make a rational decision concerning whether to continue or abandon future appeals. These reports, along with Smith's conduct, statements, and demeanor before the

habeas court, amply support the habeas court's finding that Smith is currently competent to decide his own fate.[12]

Moreover, the record amply supports the habeas court's determination that the affidavits of Hamilton, Dale Piper, Eden Harrington, and trial counsel Randy McDonald, along with twelve-year-old medical reports, were insufficient to cast doubt upon the findings of examining experts Dr. Ganc and Dr. Brown or to raise a question regarding Smith's competency.

The state habeas court correctly determined that the reports from mental examinations conducted in 1978 were too remote to be beneficial. **State v. Smith**, No. 375813 at 7, Finding 24. Hamilton quarrels with that determination by claiming that in 1985 Smith was found incompetent to forego appeals or proceed **pro se**. Hamilton badly misrepresents the record, because the trial court made no determination of Smith's mental capacity. Rather, the trial court found Smith incompetent to represent himself because he sought to proceed **pro se** in order to abandon his appeal or file a brief claiming no grounds of error. Under Texas law, appeal from a conviction of capital murder and sentence of death

[12]Hamilton's attempt to infer present mental defect from Smith's having been found not guilty by reason of insanity twelve years ago is unavailing. The order of acquittal directs Smith to seek treatment on an out-patient basis, thus indicating the Florida court's impression that Smith's impairment at the time of acquittal, if any, was not severe. Moreover, if Smith had some impairment in 1978, it was not present in 1983 and 1984, when he was evaluated at the time of trial, in 1988, when he was evaluated by Department of Corrections mental health professionals, nor at present, when he was evaluated by Drs. Ganc and Brown.

is mandatory. Tex. Code Crim. Proc. Ann. art. 37.071(h) (Vernon Supp. 1990) ("[t]he judgment of conviction and sentence of death **shall be subject to automatic review**"). Smith had absolutely no right to abandon an appeal, and his avowed intent to do so would have disrupted the appellate process in a manner akin to a defendant who disrupts a trial by outbursts or an intentional failure to follow courtroom procedures. The trial court's action to prevent Smith from circumventing the statute was entirely proper, **see Faretta v. California**, 422 U.S. 806, 834 n.46, 95 S.Ct. 2525, 2541 n.46 (1975), and does not undermine the trial court's findings of competence.[13]

After considering the evidence and arguments presented by the state and Hamilton and his own observations of Smith, the state habeas court found that Smith knows that his execution is approaching and the reason for the execution; that Smith does not now suffer from any mental disease or defect; and that Smith understands his legal position and the options available to him and demonstrates the ability to make a rational choice among those options. Appendix B at 6, Findings 20-22. Further, the state habeas court correctly determined that the evidence presented by Hamilton was insufficient to require an additional examination or hearing. **Id.** at 7-8, Findings 24-28. **See**

[13]Neither does the trial court's action transform Dr. Carbonnel's opinion into anything other than an aberration from the reports of all mental health experts who have examined Smith in the last seven years.

Demosthenes v. Baal, No. A-857, slip op. at 5 (finding that federal district court correctly denied evidentiary hearing where "next friend" presented no "meaningful evidence" of incompetency). The record fully supports the findings and conclusions of the state habeas court.

There is no evidence in this record that Smith is incompetent to elect to forego collateral review. Nor has Hamilton raised any **bona fide** doubt as to Smith's competency. The assertion that the election to forego further avenues of relief is, in and of itself, evidence of incompetency has been rejected by Justice Rehnquist:

> The idea that the deliberate decision of one under sentence of death to abandon possible additional legal avenues of attack on that sentence cannot be a rational decision, regardless of its motive, suggests that the preservation of one's own life at whatever cost is the **summum bonum**, a prosposition with respect to which the greatest philosophers and theolgoians have not agreed and with respect to which the United States Constitution by its terms does not speak.

Lenhard v. Wolff, 443 U.S. at 1312-13, 100 S.Ct. at 7.

Further as stated by Circuit Judge Sneed in his concurrence in **Lenhard v. Wolff**, 603 F.2d 91, 94:

> I am convinced that Bishop is sane and that he has made a knowing and intelligent choice to forego his federal remedies. It is difficult for me to imagine that I would make a similar choice were I in his position. What I might do, however, is not the test. Bishop is an individual who, for reasons I can fathom only slightly, has chosen to forego his federal remedies. Assuming his competence, which on this record I must, he should be free to so choose. To deny him that would be to incarcerate his spirit-the one that that remains free and which the state need not and should not imprison.

Finally, as eloquently stated by Smith, himself:

> The attempts at next friend intervention have not been an aid to the implementation of justice. Rather, what they have produced ranges from the travesty of **Gilmore v. Utah**, to the horror of **Rambaugh v. Estelle**. Claiming concern for the accused such parties swagger forth at the last moment under the banner of humanism thinking they have warrant. In their hubris the person and rights they claim to be concerned for they depreciate and traumatize.

See Appendix B, Exhibit B. There is absolutely no evidence indicative of any mental disease or defect in this case. Rather, "next friend" utilizes conjecture based upon stale and unreliable evidence coupled with dilatory tactics in an effort to obtain a stay of execution where none is deserved or desired. To allow "next friend" to succeed would merely serve the purposes of those whose philosophical views oppose the death penalty while at the same time forcing Smith to endure the mental anguish associated with further delay.

CONCLUSION

For the foregoing reasons, the state respectfully requests that the application for stay of execution be denied.

Respectfully submitted,

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